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Legal DEPARTMENT

A BRANCH

Subject:—

Opinions under the Bombay

Primary Education Act, 1923

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C O N T E N T S.

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Office of the A.I.A.

The questions raised for the consideration of the A.I.A. are-

(1) whether offences punishable under section 31 of the Bombay Primary Education Act, 1923 and tried by Magistrates would be governed by the provisions of the Criminal Procedure Code;

(2) whether similar offences tried by the Revenue or Police Patel would be governed by section 17 of the Village Police Act; and

(3) whether a Revenue or Police Patel is a Court or not and whether under section 360 of the Criminal Procedure Code, he can recover fines imposed under section 31 of the Bombay Primary Education Act, 1923.

Question 1:- Sub-Section (2) of section 1 of the Criminal Procedure Code provides;

"It extends to the whole of British India, but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

"Cognizable Offence" as defined in section 4(1)(c) means any act or omission made punishable by any law for the time being in force; it also includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871. Section 5(2) lays down that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions (i.e. provisions of the Criminal Procedure Code), but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. It is clear from these provisions that where an offence is one under a special or local law but there is no enactment prescribing any procedure for the investigation of the offence, the procedure laid down in the Code must be followed (see 49 All 188). The only restriction imposed by the Bombay

Primary Education Act, 1923 in respect of offences under section 21 is that no Magistrate, Patel or person shall take cognisance of an offence under sub-section (1) except on a complaint of the authority or person who passed the order under section 20 or by any person authorised by the said Board. Save as aforesaid the Act does not prescribe any special procedure for the trial of offences under section 21. Consequently the trial of those offences would be governed by the Criminal Procedure Code.

Question 2.- Section 17 of the Bombay Village Police Act, 1867 prescribes the procedure for the trial of offences thereunder and can have no application to the trial by the Police Patel or Revenue Patel of offences under section 21 of the Bombay Primary Education Act. A Revenue or Police Patel vested with jurisdiction to try offences under section 21 of the Bombay Primary Education Act, appears to be "a Court constituted under any law other than this Code" within the meaning of section 6 of the Criminal Procedure Code (see the definitions of "Judge" and "Court of Justice" in sections 19 and 20 of the Indian Penal Code). Consequently the trial by a Revenue or police Patel of offences under section 21 of the Bombay Primary Education Act would be also governed by the provisions of the Criminal Procedure Code.

Question 3:- As stated above, a Revenue or Police Patel in exercising jurisdiction under section 21 of the Bombay Primary Education Act is a Court and consequently the procedure prescribed by section 386 of the Criminal Procedure Code will apply to the recovery of fines levied.

by a Revenue or Police Patel under section 21 of the Bombay Primary Education Act.

Sd/-
Remembrancer of Legal Affairs.

U.O. No.352 dated the 11th January 1967.

Office of the R.L.A.

It is clear that in the absence of a provision in the Act providing for delegation of powers conferred on the Provincial Government it would not be competent for Government to delegate the powers to the Director of Public Instruction. The power of making rules given by clause (c) of section 27(1) cannot be invoked for that purpose. An amendment of the Act would be necessary to achieve the purpose.

Sd/- 7.6.47.

Remembrancer of Legal Affairs.

U.O. to S. & I. Deptt. No.5933 dated the 7th June 1947.

Office of the R.L.A.

The first question raised for the consideration of the R.L.A. is whether in view of the fact that "census" is a Federal subject in list I in the Seventh Schedule to the Government of India Act, 1935, regulations for ~~taken~~ taking census of children of school-going age can be framed under section 27(3) of the Bombay Primary Education Act, 1923, without the consent of the Central Government.

It is true that "census" is a Federal subject, being item 16 in the Federal Legislative List I in the Seventh Schedule to the Government of India Act, 1935; but a census being an official enumeration of the inhabitants of a state or country with details of sex, age, family occupation etc. (Century Dict) does not cover the census or enumeration of children of school-going age. Further "education" and "inquiries and statistics for the purposes of any of the matters in the Provincial Legislative List" being Provincial subject, the Provincial Government has powers to legislate for the purpose of taking census of children of school-going age. Under section 11of the Bombay Primary Education Act, 1923, the scheme for compulsory elementary or primary education is required to contain a census of children of either sex or both sexes residing within such area etc. and regulations for the purpose can be framed under section 27(3). Consequently the regulations ~~that framed for taking census of children of school~~ for taking a census of children of school-going age would be intra vires and since they do not trench on the powers of the Central Government no consent of that Government would be necessary. The view taken by E.D. on the question is correct.

The second question for the consideration of the R.L.A. is whether regulations 5, 6 and 7 of the Regulations at page 5 ante made by the Broach District School Board are intra vires.

In his opinion No.4035, dated the 10th July 1936, the R.L.A. opined:

> "There is no provision in the Bombay Primary Education Act, empowering a local authority to prescribe a penalty for the breach of regulations framed by it. In the absence of such a provision, it cannot lawfully make such regulations."

Regulations 5 and 6 are not penal regulations while regulation 7 is a penal provision. Consequently regulation 7 is ultra vires. The view taken by E.D. on this question also is correct.

The ~~tird~~ Third question for consideration is whether, if regulation 7 s ultra vir s, it is possible to take action against a person who fails to give information regarding census under the Indian Penal Code.

Under regulation 2 of the Regulations at page 5, ante the teachers working in the Board schools or approved schools in the locality, the Attendance Officers and the Administrative Officer are authorised for the purpose of taking census. No action for the offence either under section 175 or section 176 I.P.C. would be legally feasible unless the persons who have been authorised under regulation 2 are public servants. The persons authorised under regulation 2 are servants of the District School Board, Broach, but not of the District Local Board, Broach. The Bombay Primary Education Act does not contain any provision that its employees are public servants within the meaning of section 21 I.P.C. The Administrative Officer being one in the service and pay of Government and appointed to an offence is a public servant within the meaning of section 21 I.P.C. but not the other persons authorised under regulation 2.

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Remembrance of Legal Affairs.

U.R. to E. & I.D. No.6638 dt.the 27th June 1917.

Office of the D.L.A.

The question for D.L.A.'s consideration is whether Mr. S.N.Hunur who is a member of the Municipal School Board, Bijapur, incurs disqualification under section 3A(f) of the Primary Education Act, 1923, on account of his being Head Master of an aided Class 'A' approved primary school under the Municipal School Board.

Rule 62 of the Bombay Primary Education Rules, 1934, provides that no school shall be approved by the School Board as/class 'A' school unless it conforms to the conditions regarding staff, accommodation, equipment and courses of instruction laid down in Chapter V, sections A, B and C of these rules, and unless the managers agree to follow the rules of the Grant-in-Aid Code or such other regulations as may be made by the School Board with the sanction of the local authority and of Government. Under rule 89, the grant which may be awarded in any year to an approved class A School shall be based on the average monthly number of pupils on the on rolls in the preceding year i.e. on the average number of pupils on the rolls on the 15th day of each month of the year and calculated according to the provisions of clauses (a) and (b). Rule 90 provides for the reduction of the grant. Rule 62 appears to contemplate that in the case of class 'A' approved School, the managers enter into an agreement with the school board to follow the rules/of the Grant-in-aid Code or such other regulations as may be made by the School Board.

Under clause (f) of section 3A of the Bombay Primary Education Act, 1923, no person shall be elected or appointed a member of a school board who has directly or indirectly, by himself or his partner, any share or interest in any work done by order of the School Board or of the Local authority for which it has been constituted or in any contract or employment with, under or by, and on behalf of the School Board or such local authority. It appears that Mr. Hunur is not one of the managers of the school who

have entered into an agreement under rule 82 of the Bombay Primary Education Rules. He is merely a stipendiary Head teacher in the school. His position is that of merely an employee and nothing beyond. It is held that an employee of a company as such would have no interest in a contract between the Municipality and the company employing him as contemplated by section 15(2)(b) of the Bombay District Municipal Act, 1901 (cf. R.L.A.'s No.95-P dated 5.9.1920). On the same principle, it may be held that Mr. Munur as a Head teacher of the approved school has no interest, direct or indirect, in ~~xxxxxxxx~~ agreement entered into between the Managers and the School Board under rule 82 of the Bombay Primary Education Rules. That being so, Mr. Munur cannot be considered to be disqualified under section 3A(f) of the Bombay Primary Education Act, 1923.

Sd/- R.
Remembrancer of Legal Affairs.

U.R. to E. & I.Department No.9206 dated 15th September 1947.

L.D.R.I.No.13419 dt. 6.11.47.

Submitted.

Please see R.L.A.'s opinion No.9206 dated 15th September 1947 and the E. & I.D. notes at pp. 17-18 ante. E. & I.D. states that R.L.A. has impliedly held that managers of aided schools are disqualified and that this is contrary to Rule 17(1)(i)(b) of the P.E.Rules under which managers are entitled to be elected as persons experienced in education. The Joint Secy., E.D. considers that Rule 17(1)(i)(b) is ultra vires but he desires the R.L.A. to see and advise..

Confirmation of Mr.Jambusaria by District School Board, Broach

Bombay Primary Education Act, 1923.

It appears that one Mr. Jambusaria a non-matriculate was employed by the District School Board, Broach, from 1933 and was borne on the temporary establishment till 1944. Since he did not pass the accounts clerk's examination in time the School Board requested the Government to exempt him from passing that examination. That request was not granted. The School Board had however found the work of Mr. Jambusaria satisfactory and with a view to retain his services approached the Director of Public Instruction to allow him to appear or to exempt him from passing the examination. The Director refused either of the requests whereupon the School Board passed its resolution dated 7th May 1946 to the effect that, in view of the reply of the Director of Public Instruction, Mr. Jambusaria should be held to have failed to pass the examination but as he was otherwise fit to be continued in the Board's services he should be confirmed in the lowest grade of clerks. After this resolution was passed, Government by G.L., E.D., No.S.79(4)-F dated the 23rd September 1946 issued orders relaxing as a special case the provisions of rule 63(1)(a) of the Primary Education Rules in favour of Mr. Jambusaria allowing him to appear for the ensuing school board's clerk's examination. After this resolution was passed the School Board was asked to cancel its resolution on the ground that Mr. Jambusaria could not be confirmed in the lowest grade of the clerical cadre as he did not appear for the examination and as such could not be deemed to have failed in the examination. The School Board did

not agree with the view taken by the Director of Public Instruction and replied that his refusal to allow Mr. Jambusaria to appear for the examination amounted to his failure to pass the examination within the meaning of clause 1(b) of rule 53 of the Primary Education Rules. The Director of Public Instruction has reported the matter to Government and the Under Secretary, E.D., observes "when the D.P.I. refused to allow Mr. Jambusaria to appear for the examination the latter should have made an appeal to Govt. against the D.P.I.'s orders. Probably he did not do so as he wanted to take advantage of the ambiguous wording of the rule. The D.P.I. was not however the final authority in the matter and it is therefore a question whether his refusal to allow Mr. Jambusaria to appear for the examination would amount to Mr. Jambusaria's failure to pass the examination especially in view of the fact that the final authority of allowing a clerk to appear for the examination or not vests in Government and not in the D.P.I." The A.G.A. is requested to advise whether the view taken by the District School Board, Broach, is correct.

Sub rule (1) of rule 53 of the Bombay Primary Education Rules, 1934, provides that the conditions mentioned in clauses (a) to (d) shall be fulfilled before clerks are appointed, confirmed x or promoted to higher grades. Clause (a) provides; "No clerk shall be appointed unless he has passed the School Leaving Certificate or Matriculation or equivalent examination." Clause (b) provides; "All new entrants shall appear for the Accounts Clerks' examination with four years of recruitment provides that

that in the case of any such entrant the said period may be extended by the Director on the recommendation of the local authority concerned by a period not exceeding two years. All new entrants shall be on probation and shall not be confirmed or given any increment until they pass the said examination.

Provided that those who fail to pass the examination may, if their work is otherwise satisfactory be confirmed in the lowest grade of the clerical cadre and given increments after confirmation but shall be debarred permanently from promotion to a higher grade.

Provided further that in the case of a clerk who was either temporary, officiating or on probation on the 22nd May 1930, and in whose case a strict observance of clause (b) would cause hardship, the Director may, with the concurrence of the Examiner, Local Fund Accounts, extend the period within which such clerk may pass the said examination. In case the Director and the Examiner, Local Fund Accounts, disagree, the case shall be submitted for orders to Government.

Reading these provisions it is clear that the test of examination is intended to enable new entrants to be confirmed or given any increments. Obviously, therefore, this provision is intended for the benefit of the new entrants and consequently it is in their own interest that they should pass the examination within the period of four years of recruitment or within the period extended by the D.P.I. or by Government. If a new entrant does not care to appear for the examination within the period of four years of recruitment or was not given any extension for appearing for such examination or who refused such extension, he would not be eligible for confirmation or

apparent that a candidate who does not appear for the examination within the period of four years or within the period extended by the D.P.I. would be deemed to have failed to pass the examination. No distinction can be drawn between a candidate who did not appear for the examination (whatever be the cause for such non-appearance) and a candidate who appeared and failed to pass the examination; because the result in both cases is the same namely, failure to pass the examination. The penalty for failure to pass the examination is that the entrant cannot be confirmed or granted any increment. It is open to him either to pass the examination within the period of four years or within the extended period or to forego his rights to be confirmed and be eligible for increments. Since Mr. Jambunaris did not pass the examination within the period of four years nor did obtain any extension, he would be deemed to have failed to pass the examination. Consequently the first xxxx proviso to clause (b) of rule 53(i) was clearly applicable and the resolution of the District School Board confirming Mr. Jambunaris in the lowest grade of the clerical cadre is valid.

Sd./ E/- 17.67

Remembrancer of Legal Affairs.

U.D. to L. & I.D. No.11036, dated the 17th November 1967.

Office of the R.L.A.

Application of Primary Education Act to Cantonment Areas

Bombay Primary Education Act, 1947

and

Cantonments Act, 1924

and

Government of India Act, 1935.

"Local Self-Government" in the Cantonment areas falls within the Central field (See entry 5 in List I). It could be open to the Central Legislature to deal with primary education as part of Local Self-Government and the Provincial Legislatures would doubtless then be precluded from interfering with this legislation lest such interference would affect the Local Self-Government law of the Central Legislature. "Education" falls in the Provincial Legislative List. Legislation by the Provincial Legislature within the full ambit of the Provincial subject will not be ultra-vires if the field is clear; but if the Central Legislature has already occupied the field, the Provincial Legislature will be ousted to that extent. In the present case the Central Legislature by enacting clause (n) of section 110 has already occupied the field and, therefore, any legislation in respect of primary education by the Provincial Legislature will not be applicable to the Cantonments.

Sd/-R.23.12

Remembrancer of Legal Affairs.

U.O. to Education and Industries Department, No.13335 dated the 23rd December 1947.